

IV. IN PLACE OF THE SEPARATE AFFILIATE APPROACH, THE COMMISSION SHOULD INTERPRET THE COMMUNICATIONS ACT TO REMOVE REGULATORY IMPEDIMENTS TO ILEC INVESTMENT IN ADVANCED SERVICES

As explained above, a regulatory approach that facilitates ILEC provision of advanced services on an integrated basis will most effectively promote competition in the mass market for advanced services. Even if the Commission correctly has decided that it cannot forbear from Section 251(c) for ILEC's advanced services, the Commission still retains ample authority to interpret the Act in a manner that does not diminish ILECs' incentives to invest in the provision of advanced services.

Such an interpretation requires, at a minimum, that the Commission refrain from adopting burdensome new unbundling and resale rules for advanced services that fail to reflect the evolving nature of the advanced services market. Equally important, the Commission must aggressively exercise its forbearance authority to grant relief in appropriate cases from dominant carrier pricing and tariffing requirements applicable to ILECs' advanced services offerings. Finally, the Commission must be vigilant in identifying and eliminating other existing or potential barriers that inhibit ILEC investment in advanced services, especially those barriers that restrict the ability of ILECs to provide interLATA advanced services on the same basis as their competitors.

Adopting this framework will help ensure that competition, not regulation, remains the driving force behind the deployment of advanced services. Competition cannot develop without distortion as long as certain players are excluded from significant portions of the market or are otherwise handicapped.

A. THE COMMISSION SHOULD ADOPT UNBUNDLING AND RESALE RULES THAT REFLECT THE EQUAL OPPORTUNITY THAT ALL COMPETITORS HAVE TO INVEST IN THE DEPLOYMENT OF ADVANCED SERVICES

In the *Notice*, the Commission appears to be proceeding under the incorrect assumption that it may not treat advanced services differently from POTS under Section 251(c) of the Act unless the advanced services are not provided by an ILEC (*i.e.*, are structurally separate from the local exchange business of the ILEC). Structural separation, however, is unnecessary and ill-advised. The Commission instead can and should use its discretion to avoid prescribing unbundling and resale rules that discourage investment in advanced services by both ILECs and new entrants.

1. **The Commission Should Not Adopt Prescriptive Unbundling Rules For Advanced Services Equipment**

The mass market for advanced services is an emerging market. While many firms are vying to become the leading provider of broadband access to the Internet and other data services, advanced services are not yet available to most Americans. A firm's success or failure in the advanced services market will depend upon many factors, including consumer demand, the quality and price of service, and the development of increasingly sophisticated technologies. Ideally, the Commission's regulatory framework should not also be one of these factors.

Because the mass market for advanced services is still developing, the Commission should avoid the temptation to micromanage it through burdensome, prescriptive national rules that are based on speculative harms and that easily could delay the deployment of advanced services. In particular, the Commission should not assume that it *must* impose specific unbundling requirements on network elements used by ILECs to provide advanced services simply because it interpreted Section 251(c) *to apply* to network elements used to provide such

services. As the Commission has noted, it has the authority “to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access.”⁴⁸

The Commission must also refrain from requiring unbundling where the ILEC’s failure to provide requested network elements will not impair the ability of the requesting carrier to provide its services.⁴⁹ Similarly, the Commission has the authority to refrain from adopting any specific unbundling proposals and to allow negotiation and arbitration to decide whether unbundling of advanced services network elements is appropriate.

Declining to prescribe national rules does *not* mean that competitive advanced services providers will be denied access to the elements they need to provide service. The rules adopted in the *Local Competition Order* guarantee that competitors will be able to provide their own advanced services by purchasing elements of the underlying circuit-switched network on an unbundled basis. Indeed, BellSouth already has made available unbundled network elements that support the deployment of DSL services, enabling competitors to deploy the equipment of their choice. Competitors may then attach their own DSLAM or other advanced services equipment

⁴⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15640, ¶ 278 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted*, 118 S. Ct. 879 (1998) (“*Local Competition Order*”), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *aff’d sub nom. Southwestern Bell Telephone Company v. FCC*, Case Nos. 97-3389, 97-357, 97-3663, and 97-4106, (8th Cir., August 10, 1998), *further reconsideration pending*.

⁴⁹ 47 U.S.C. § 271(d)(2).

to these elements.⁵⁰ In this sense, ILECs do not enjoy any competitive advantage, as they too must make the same new investments to deploy their own advanced services networks.

Moreover, the Commission must not view ADSL as the only advanced services product that will be offered by the ILECs, but should recognize ADSL technology as a transitional method of providing additional bandwidth for advanced services over the local loop. Not only will ADSL technology evolve, BellSouth and other ILECs continue to place fiber deeper into their networks. These placements include fiber-to-the curb. As these fiber deployments expand, it is inevitable that advanced services will transition likewise to the fiber networks. Thus, any broad determinations that the Commission might make now relative to unbundling requirements for ADSL are unlikely to transition to fiber-based local loop technologies.

If the Commission refuses to find that unbundling of advanced services equipment is not required under the standards of Section 251, and competitors correspondingly are granted some type of access to an ILEC's advanced services equipment, the negotiation and arbitration process established in Sections 251 and 252 of the Act provides sufficient opportunity for the competitor to obtain such access without Commission intervention and better fits the fluid nature of the market and the technologies. Congress specifically permitted parties to negotiate and enter into binding agreements for unbundling of network elements "without regard to the standards set

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As Commissioner Ness has observed, "[t]he evolving DSL equipment necessary to carry high-speed digital signals on properly conditioned loops is available to both the ILECs and CLECs. So is the associated multiplexing and routing/switching equipment necessary to create advanced high-speed data communications services." Commissioner Susan Ness, "To Have and Have Not: Advanced Telecommunications Technologies," Remarks Before the Computer and Communications Industry Association's 1998 Washington Caucus (June 9, 1998).

forth in” Section 251(b) and (c).⁵¹ Congress also granted state commissions the authority to arbitrate disputes arising out of such negotiations.⁵² As the Commission noted in the *Local Competition Order*, state commissions have full authority to require ILECs to unbundle elements that the Commission does not specify.⁵³ The Commission should not assume that advanced services equipment (if actually needed for competitive entry) will not be available on an unbundled basis unless the Commission requires it on a national level. Rather, the Commission should first rely on voluntary negotiations and, if they fail, trust the state commissions to fulfill their statutory responsibility to make advanced services equipment available to competitors where appropriate under Sections 251 and 252.

2. The Commission Should Retain Resale Rules That Grant ILECs The Flexibility To Offer DSL Service On A Wholesale Basis

In the *Notice*, the Commission proposes to apply Section 251(c)(4) resale obligations to ILEC provision of advanced services, regardless of whether such services are local exchange or exchange access services.⁵⁴ This proposal is founded upon the Commission’s assumption that advanced services are generally marketed to residential or business users or to Internet service providers (“ISPs”). Under the Commission’s assumption, because these users are not telecommunications carriers, advanced services must be subject to Section 251(c)(4) resale requirements.

⁵¹ 47 U.S.C. § 252(a)(1).

⁵² *Id.* § 252(b)(1).

⁵³ *See Local Competition Order*, 11 FCC Rcd at 15625, ¶ 244.

⁵⁴ *Notice* at ¶ 189.

The Commission's analysis fundamentally misreads the requirements of Section 251(c)(4). Under Section 251(c)(4), an ILEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."⁵⁵ Thus, by its express terms, the Section 251(c)(4) resale obligations only apply if (1) a service is offered at retail and (2) the service is offered to subscribers who are not telecommunications carriers. The Commission's proposal ignores the first part of this two-part test.

Under the Commission's proposal, advanced services are subject to Section 251(c)(4) resale obligations because, in the Commission's view, advanced services customers are generally residential and business customers or ISPs, and not other telecommunications carriers. Even if this were an accurate description of the market, it alone would not subject an ILEC's advanced services offering to Section 251(c)(4). As the Commission has recognized, Section 251(c)(4) "does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers."⁵⁶ There clearly are scenarios where ILEC advanced services offerings will not be sold at retail, but will be sold in bulk to ISPs or carriers for incorporation into the service they provide to their customers. In such cases, the actual costs of providing the advanced services will be the same regardless of whether the customer is an ISP or a carrier.

⁵⁵ 47 U.S.C. § 251(c)(4).

⁵⁶ *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 872.

In the *Local Competition Order*, the Commission noted that, even though “end users do occasionally purchase some access services,”⁵⁷ exchange access services are not subject to Section 251(c)(4) resale requirements because they are “predominantly offered to, and taken by, IXCs, not end users.”⁵⁸ Similarly, the Commission should not impose Section 251(c)(4) resale obligations on an ILEC that chooses to market its advanced services on a predominantly wholesale basis, regardless of whether end users occasionally purchase such services.

B. THE COMMISSION MUST AGGRESSIVELY IMPLEMENT ITS SECTION 10 FORBEARANCE MANDATE TO REMOVE PRICING AND TARIFFING RESTRICTIONS THAT IMPEDE ILECS’ ABILITY TO RESPOND TO MARKET CONDITIONS

Although this proceeding is intended to facilitate the deployment of advanced services, conspicuously absent from the *Notice* is any discussion of providing ILECs that offer advanced services on an integrated basis relief from dominant carrier pricing and tariffing restrictions.⁵⁹ Since the *Competitive Carrier* proceeding in the early 1980s,⁶⁰ the Commission has recognized that stringent pricing and tariffing restrictions for carriers without market power

⁵⁷ *Id.* at 15934, ¶ 873.

⁵⁸ *Id.* at 15935, ¶ 874.

⁵⁹ Dominant carrier regulation includes (1) any applicable price cap or rate of return regulation for ILEC provision of advanced services, (2) the requirement that ILECs file tariffs on more than one day’s notice with cost support, (3) restrictions on contract carriage, and (4) any dominant carrier Section 214 requirements that may apply.

⁶⁰ *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore*, CC Dkt. 79-252, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Fifth Report and Order, 98 FCC 2d 1191 (“*Competitive Carrier Fifth Report and Order*”); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated sub nom. MCI Tel. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively, the “*Competitive Carrier proceeding*”).

are unnecessary and, indeed, unwise. As explained in BellSouth's *NOI* comments, ILECs that provide DSL services do not possess market power in the advanced services market.⁶¹ Removal of dominant carrier regulation on ILEC provision of DSL service is accordingly an important step in creating incentives for the deployment of advanced services.

The Commission should aggressively exercise its forbearance authority and grant relief from dominant carrier pricing and tariffing requirements. Even if the Commission is correct in its determination that it cannot forbear from the unbundling and resale obligations of Section 251(c),⁶² the Commission retains full authority to forbear from pricing and tariffing regulations, as such regulations do not implicate the ILEC obligations of Section 251(c) or the interLATA restrictions on BOCs contained in Section 271.⁶³ Indeed, under Section 10, the Commission is *required* to forbear from any regulatory requirement or statutory provision for which (1) enforcement is not necessary to ensure that rates and practices of a telecommunications carrier or service are just, reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶⁴ In making its public interest determination, Congress has instructed the Commission to consider whether forbearance will promote competitive market conditions,

⁶¹ See BellSouth *NOI* Comments at 31-36.

⁶² *Order* at ¶ 79.

⁶³ 47 U.S.C. § 160(d).

⁶⁴ *Id.* § 160(a); see also Powell Remarks ("Congress . . . made a number of changes itself directly [in the 1996 Act] . . . [p]erhaps non more important than regulatory forbearance, which commands us not to apply any regulation if we determine certain things.").

including whether forbearance will enhance competition among telecommunications service providers.⁶⁵

Where a carrier is non-dominant in a particular service, the Commission has effectively determined that the elements for Section 10 forbearance are present.⁶⁶ In the *Competitive Carrier* proceeding, the Commission determined that it was in the public interest to streamline regulation of non-dominant carriers and provide such carriers with flexibility to establish their prices and service offerings in response to market demand. The Commission found that regulation was unnecessary to protect against unjust, unreasonable, and discriminatory rates because market forces would amply provide such protection.⁶⁷ Moreover, even without stringent dominant carrier pricing and tariffing regulations, consumers would be protected because they “could always turn to competitors.”⁶⁸ In light of the Commission’s long-standing policy on streamlining regulation of non-dominant carriers, the Commission should freely grant forbearance from dominant carrier pricing and tariffing requirements for advanced services offerings in any case in which the requesting carrier demonstrates its lack of market power in the advanced services market.

⁶⁵ *Id.* § 160(b).

⁶⁶ See, e.g., *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) (“*AT&T Reclassification Order*”), Order on Reconsideration, Order Denying Petition for Rulemaking, Second Order on Reconsideration in CC Docket No. 96-61, 12 FCC Rcd 20787 (1997).

⁶⁷ See Powell Remarks (“it is plain to see that the market is a replacement for regulators making decisions about what services will be offered, what technology will be deployed, by whom, to whom, and at what price.”).

⁶⁸ *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 12 FCC Rcd 1111, 1131 n.75; see also *Comsat Corporation*, Order and Notice of Proposed Rulemaking, File No. 60-SAT-ISP-97, FCC 98-78, at ¶ 9 (rel. April 28, 1998).

V. THE COMMISSION SHOULD ACT QUICKLY TO REMOVE THE PRINCIPAL REGULATORY BARRIER TO ROBUST COMPETITION AND INVESTMENT IN THE ADVANCED SERVICES MARKET: THE INTERLATA PROHIBITION

The procompetitive proposals outlined in these comments are only initial measures that the Commission should take in this proceeding to foster competition in and deployment of advanced services. If the Commission goes no further, however, its actions will have a relatively small impact on BOCs' investment in advanced services. Without interLATA relief, BOCs will be hamstrung in their ability to satisfy customers' demand for end-to-end high-speed data services and will have severely limited access to the revenues available to support advanced services initiatives. Customers demand that high-speed access services, like ADSL and cable modems, not be impeded by bottlenecks within the Internet itself, as is evident from the major cable operators' initiatives to construct nationwide backbones and caching servers. BOCs must similarly be permitted to ensure that their customers get the full benefit of end-to-end high-speed access service.

Every other actual or potential provider of advanced services capabilities -- including GTE, other non-BOC ILECs, CLECs, and cable operators -- may provide their customers with end-to-end networking services regardless of geography, while the BOCs are required to hand off their high-bandwidth signals to other carriers at LATA borders.⁶⁹ This regulatory restriction operates as a substantial competitive disadvantage to the BOCs vis-à-vis their many broadband competitors. BOCs alone cannot provide their advanced services customers assurance of end-to-end service quality and security, as they demand. Nor do BOCs have full access to the advanced services market's growing revenues to support their investment.

⁶⁹ See BellSouth *NOI* Comments at 44-46.

If the Commission truly seeks to promote the deployment of advanced services on a timely basis, it is imperative that it promptly grant Section 271 petitions and remove this high hurdle to full-fledged competition.⁷⁰ Without this relief, BOCs' opportunity to invest profitably in broad-scale deployment of advanced services throughout their regions will be severely constrained.

While BellSouth does not object to the Commission's liberally granting petitions for LATA boundary modifications for advanced services, and encourages the Commission to do so, the Commission must not be deluded: such modifications will have little, if any, impact on competition or on BellSouth's investment incentives. LATA boundaries are legal constructs that arose out of divestiture more than a decade ago and do not represent an efficient geographic division for advanced services networks. Modifying LATA boundaries to permit BOCs to deploy advanced services, while a procompetitive gesture, would not address the fundamental incompatibility of the LATA construct with the provision of advanced services and would leave BOCs at a substantial competitive disadvantage and with limited investment incentives. It is access to the interLATA market that will drive increased investment and rapid, broad-scale deployment of services such as ADSL.

VI. AN ILEC AFFILIATE THAT COMPLIES WITH THE SEPARATION REQUIREMENTS ADOPTED IN THE *COMPETITIVE CARRIER* PROCEEDING SHOULD NOT BE DEEMED AN ILEC

The unbundling and resale obligations of Section 251(c) apply only to firms who were ILECs when the 1996 Act was enacted and to their "successor and assigns."⁷¹ In the *Notice*, the Commission proposes to allow ILECs to create a "truly" separate advanced services

⁷⁰ At a minimum, the Commission should not attempt to use this proceeding to impose additional roadblocks or conditions on the ability of BOCs to obtain Section 271 relief.

⁷¹ 47 U.S.C. § 251(h).

affiliate that would not be deemed a successor or assign of an ILEC and, thus, would not be subject to Section 251(c) requirements.⁷²

As explained above, the separate affiliate concept proposed in the *Notice* is simply the wrong approach to adopt for ILEC provision of advanced services. If the Commission seeks to promote the deployment of advanced services, then it should adopt reasonable interpretations of the Act that permit ILECs to provide services on an integrated basis. Without this ability, the “option” of forming a separate affiliate effectively operates as a Commission mandate directing ILECs to provide advanced services using a prescribed business structure. Rather than proceed down that path, BellSouth urges the Commission to abandon the separate affiliate approach altogether and concentrate instead on facilitating ILEC deployment of advanced services on an integrated basis.

The Commission should not misconstrue the discussion in the remainder of this section. BellSouth strongly believes that the recent imposition of the *Competitive Carrier* separation requirements with respect to in-region CMRS services and non-BOC provision of in-region, interexchange services are unwarranted and excessive. Nonetheless, the precedent of those cases precludes the Commission from imposing a greater degree of separation in order for advanced services affiliates to avoid the obligations of their affiliated ILECs. Indeed, a significantly lesser degree of separation is sufficient to achieve that end.

If the Commission persists in formulating a separate affiliate option for the provision of advanced services, BellSouth opposes the current proposed framework because it far exceeds what is legally and practically necessary to form a non-ILEC affiliate. Rather than

⁷² *Notice* at ¶ 92.

impose the rigid separation requirements of Section 272, which were designed merely as a transition framework for BOC entry into interLATA services, the Commission should follow its more recent decisions and base any separation requirements upon the framework developed in the *Competitive Carrier* proceeding. This framework provides greater flexibility to achieve some of the efficiencies of integrated operation while adequately insulating the affiliate from ILEC status.

A. THE COMMISSION SHOULD NOT RELY ON SECTION 272 IN DEVELOPING THE SEPARATION REQUIREMENTS FOR ADVANCED SERVICES AFFILIATES.

In the *Notice*, the Commission proposes a variety of structural separation and nondiscrimination requirements with which ILECs' advanced services affiliates would be required to comply to escape ILEC status.⁷³ These requirements are derived from the separation requirements contained in Section 272 of the Act⁷⁴ and from the Commission decisions implementing that section.⁷⁵ Section 272, however, is concerned with the unique situation of BOC entry into the interLATA market, a market from which BOCs have been excluded since

⁷³ *Id.* at ¶ 96.

⁷⁴ 47 U.S.C. § 272.

⁷⁵ *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"), Order on Reconsideration, 12 FCC Rcd 2297 (1997), *recon. pending, petition for summary review in part denied and motion for voluntary remand granted sub nom.*, *Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir. filed Mar. 31, 1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom.* *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Second Report and Order, 12 FCC Rcd 15756 (1997); *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996).

1984. The Section 272 framework far exceeds what is required for intraLATA advanced services affiliates to avoid ILEC obligations and should not be adopted in this proceeding.

In enacting the 1996 Act, Congress sought to create a procompetitive, deregulatory framework that would, among other things, increase competition in interLATA services by removing the bar on BOC entry into that market. To that end, Congress enacted Section 272 to serve as a transition mechanism between complete prohibition and full-fledged BOC participation in the interLATA market. By its terms, the Section 272 separate affiliate requirement for interLATA services must end “3 years after the date [a BOC or BOC affiliate] is authorized to provide interLATA telecommunication services under Section 271(d),” unless extended by the Commission.⁷⁶ Nothing in this transition framework suggests that Congress believed that Section 272 separation requirements represented a preferred method of encouraging the deployment of new and innovative services or that compliance with Section 272 would be required to avoid ILEC status. Given the unique regulatory setting that Section 272 was intended to address, the Commission should not rely on the Section 272 framework to determine whether an ILEC affiliate will be deemed to be an ILEC for purposes of Section 251(c).

⁷⁶ 47 U.S.C. § 272(f)(1). In addition, the Commission may forbear from applying Section 272 in appropriate circumstances prior to the expiration of the three-year term. *Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, Memorandum Opinion and Order, CC Dkt. No. 96-149, DA 98-220 (CCB Feb. 6, 1998), *errata*, Mar. 3, 1998.

**B. THE SEPARATE AFFILIATE FRAMEWORK DEVELOPED IN THE
COMPETITIVE CARRIER PROCEEDING IS MORE THAN SUFFICIENT TO
INSULATE ADVANCED SERVICES AFFILIATES FROM ILEC STATUS**

The central purpose of a separate affiliate option is to establish “separation requirements for advanced services affiliates [that would be] sufficient for those affiliates to be deemed non-incumbent LECs.”⁷⁷ A separation framework based on the *Competitive Carrier* model would more than satisfy this objective. Under a modified version of this framework, an advanced services affiliate would not be deemed an ILEC if the affiliate (1) maintains separate books of account, (2) does not jointly own transmission or switching facilities with its affiliated LEC that the LEC uses for the provision of local exchange services in the same in-region market, (3) acquires telecommunications facilities, services, or network elements from the affiliated LEC pursuant to tariff or a negotiated agreement under Sections 251 and 252 of the Act, and (4) acquires non-telecommunications services from affiliated LEC on an arm’s length basis pursuant to the Commission’s affiliate transaction rules.⁷⁸ As explained below, the *Competitive Carrier* framework fulfills all of the goals behind forming a separate affiliate while providing ILECs with greater flexibility to structure their business operations in a manner that better comports to market demands.

⁷⁷ Notice at ¶ 96.

⁷⁸ See, e.g., *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9; *Amendment of the Commission’s Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Service*, Report and Order, 12 FCC Rcd 15668, 15673, ¶ 5 (1997) (“LEC-CMRS Order”), clarification, 12 FCC Rcd 17983 (1997).

1. **The *Competitive Carrier* Framework Ensures That Advanced Services Affiliates Are Not Deemed ILECs**

In the 1996 Act, Congress adopted a precise and limited definition of which entities would be considered ILECs and would be subject to the obligations of Section 251(c). ILECs are only those entities that were members of the National Exchange Carriers Association ("NECA") on the date of enactment of the 1996 Act, or their successors and assigns.⁷⁹ As no advanced services affiliate would have been a member of NECA in 1996, such affiliates could only be deemed ILECs if they are "successors or assigns" of an ILEC.

In adopting a limited definition of an ILEC, Congress intended that ILEC status, and the obligations tied to that status, should only apply to entities that controlled the embedded phone network and not to entities that were merely affiliated with ILECs.⁸⁰ The Commission recognized the limited meaning of a "successor or assign" in the *Non-Accounting Safeguards Order*. There, the Commission expressed concern that a BOC would be able to circumvent the requirements of Section 272 by transferring "key local exchange and exchange access services and facilities to the 272 affiliate."⁸¹ The Commission concluded, however, that such a transfer could not circumvent Section 272 because "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," the transferee would be an "assign" of the BOC and thus, would also be subject to

⁷⁹ 47 U.S.C. § 251(h). The Commission also may treat a carrier as an ILEC if the carrier occupies a market position comparable to that of an ILEC, the carrier has substantially replaced the ILEC, and such treatment is in the public interest. *Id.* There can be no reasonable argument that an advanced services affiliate would fall within these criteria.

⁸⁰ Compare *id.* § 271(a) (restricting interLATA services provided by BOCs or "any affiliate" of a BOC).

⁸¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054, ¶ 309.

Section 272.⁸² Similarly, only where the advanced services affiliate becomes a “successor” of the LEC (*e.g.*, through a merger) or becomes an “assign” of the LEC by obtaining ownership over “key local exchange and exchange access services and facilities” should such affiliate be deemed an ILEC subject to the obligations of Section 251(c).

A separate affiliate that complies with the *Competitive Carrier* framework sufficiently insulates the affiliate from ILEC status. Such an affiliate is not a successor of the ILEC, as the ILEC will continue to provide local exchange and exchange access services in its region. Nor is an advanced services affiliate an assign of the ILEC. The ILEC would retain ownership over all of the network elements of the underlying circuit-switched network. Only facilities and services that are used to provide DSL service or other advanced services would be transferred to the affiliate.⁸³ Accordingly, adopting the *Competitive Carrier* separation approach, rather than the more onerous Section 272 model, for advanced services affiliates fulfills the primary objective of the separate affiliate option: to allow an ILEC to provide advanced services without being subject to Section 251(c) obligations.

2. The *Competitive Carrier* Framework Protects Against Cost Misallocation And Discriminatory Treatment

As explained above, a separate affiliate framework is unnecessary to protect against cost misallocation and discriminatory practices. The Commission has long recognized that price cap regulation and resale requirements greatly diminish the incentive that a carrier may

⁸² *Id.*

⁸³ See Section VI.C *infra* for a discussion of transfers to the advanced services affiliates.

have to misallocate costs.⁸⁴ Other non-structural safeguards, such as the ability of competitors to obtain unbundled network elements to provide their own advanced services, also protect against discrimination. However, to the extent an ILEC chooses to offer advanced services using a separate affiliate, the *Competitive Carrier* framework addresses any lingering concerns about cost misallocation and discriminatory practices. The Commission has used the *Competitive Carrier* separation model to address concerns regarding cost misallocation and discrimination since it issued the *Competitive Carrier Fifth Report and Order* in 1984. In the *Competitive Carrier Fifth Report and Order*, the Commission determined that independent LECs providing domestic, interstate, interexchange services through a separate affiliate that complied with certain separation safeguards would not be regulated as dominant in those services. The Commission required that the affiliate (1) have separate books of account, (2) must not jointly own transmission or switching facilities with the LEC, and (3) must acquire services from the LEC pursuant to tariff.⁸⁵ The Commission has recently reasserted the adequacy of the *Competitive Carrier* framework to protect against cost misallocation and discrimination for non-BOC provision of in-region interstate, domestic, interexchange services in the *Dom/Nondom Order*.⁸⁶

⁸⁴ See, e.g., *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Dkt. No. 95-20, FCC 98-8, at ¶¶ 44, 58 (rel. Jan. 30, 1998); *Price Cap Performance Review for AT&T*, 8 FCC Rcd 6968, 6968, ¶ 3 (1993).

⁸⁵ *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

⁸⁶ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15854, ¶ 170 (1997), Reconsideration Order, FCC 97-229 (rel. June 27, 1997) ("*Dom/Nondom Order*").

Similarly, the Commission relied on a modified version of the *Competitive Carrier* framework to alleviate concerns of cost misallocation and discriminatory interconnection in the *LEC-CMRS Order*. In that order, the Commission concluded that a *Competitive Carrier* level of separation between an ILEC and its in-region CMRS affiliate “provides an adequate measure of transparency between an incumbent LEC’s wireline and in-region CMRS operations so as to prevent improper cost allocations and to ensure that competing CMRS providers are receiving nondiscriminatory treatment.”⁸⁷ The Commission specifically rejected arguments that more stringent separation requirements, such as those previously required between BOCs and their cellular operations, were necessary to address the Commission’s concerns about cost misallocation and discrimination.⁸⁸

In light of these precedents, applying a *Competitive Carrier* framework to ILECs who choose to provide advanced services through a separate affiliate would address any lingering concerns that the Commission may have regarding cost misallocation and discrimination.⁸⁹

3. The *Competitive Carrier* Framework Would Grant ILECs Greater Flexibility And Is More Efficient Than The Proposed “Truly” Separate Affiliate

Adopting a *Competitive Carrier* framework for advanced services affiliates would also allow a greater level of efficiency than would be available under the Commission’s proposed “truly” separate affiliate framework. In the *Competitive Carrier Fifth Report and Order*, the Commission declined to require the domestic, interstate, interexchange affiliates of independent

⁸⁷ *LEC-CMRS Order*, 12 FCC Rcd at 15703, ¶ 57.

⁸⁸ *Id.*

⁸⁹ *See Notice* at ¶ 97.

LECs to employ fully-separated personnel and marketing functions.⁹⁰ Similarly, in the *LEC-CMRS Order*, the Commission stated that requiring the CMRS affiliate to have separate officers and employees is not “necessary to prevent anticompetitive discrimination and cost misallocation,” especially in light of the Commission’s affiliate transaction rules.⁹¹ The Commission specifically noted that “a flat ban on common employees will unnecessarily impose an efficiency cost upon incumbent LECs, and that eschewing these efficiencies is not outweighed by a competitive benefit from such a ban.”⁹²

Similarly, the Commission should reject the “truly” separate affiliate model proposed in the *Notice* because it would impose enormous efficiency costs on ILECs and their advanced services affiliates. As noted above, a prohibition on common officers, directors, and employees will require unnecessary and wasteful duplication of resources.⁹³ Similarly, the Commission has recognized that “[m]arketing plays an important role, and represents a significant cost, in bringing new services to the public.”⁹⁴ The Commission should not “handicap” ILECs by limiting their ability to jointly market advanced services with their affiliates, “particularly when significant competitors in the markets for [advanced] and integrated

⁹⁰ *Competitive Carrier Fifth Report and Order*, 98 FCC 2d at 1198, ¶ 9.

⁹¹ *LEC-CMRS Order*, 12 FCC Rcd at 15706, ¶ 64.

⁹² *Id.*

⁹³ *See also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24012, ¶ 269 (1997) (“Requiring separate officers, employees, and directors would preclude a foreign-affiliated carrier from taking advantage of economies of scale and scope that could allow it to provide better service at lower cost to consumers.”), *recon. pending*.

⁹⁴ *Computer III Order*, 104 FCC 2d at 1012, ¶ 99.

systems are not so limited.”⁹⁵ For this reason, and the other reasons described above, the Commission not adopt a separate affiliate framework that is any more restrictive than the *Competitive Carrier* framework for ILECs that choose to provide advanced services through a separate affiliate.

C. THE COMMISSION SHOULD ALLOW A ONE-TIME TRANSFER OF ADVANCED SERVICES OPERATIONS TO AN AFFILIATE WITHOUT DEEMING THE AFFILIATE AN ILEC

In the *Notice*, the Commission proposes to permit an ILEC to make certain transfers to its advanced services affiliate without rendering the affiliate a successor or assign of the ILEC.⁹⁶ A liberal transfer policy must exist for a separate affiliate alternative to be meaningfully available to ILECs. ILECs such as BellSouth have already begun deploying advanced services in a number of areas. Such ILECs should have an opportunity to centralize their advanced services offering in a single company. Accordingly, BellSouth urges the Commission to allow ILECs choosing a separate affiliate option to make a one-time transfer of its operations into a separate affiliate without rendering the affiliate an ILEC. Any such transfer should be exempt from any nondiscrimination requirement as the Commission proposed.⁹⁷

In particular, any separate affiliate regime adopted by the Commission should allow the transfer of all facilities used specifically to provide advanced services, including the DSLAM, packet switches, and transport facilities.⁹⁸ Network elements of the underlying circuit-switched networks, such as loops, would remain within the ILEC and would continue to be

⁹⁵ *Id.*

⁹⁶ *Notice* at ¶¶ 104-115.

⁹⁷ *Id.* at ¶ 111.

⁹⁸ *Id.* at ¶ 108.

available to competitors on an unbundled basis. Similarly, the Commission should freely allow the transfer of items other than facilities, such as customer accounts, employees, and brand names, to the advanced services affiliate. These items are necessary parts of an advanced services offering, and they are not elements that competitors require to provide a competitive voice or DSL service.

VII. THE COMMISSION SHOULD NOT TRANSFORM THIS PROCEEDING INTO ANOTHER LOCAL COMPETITION PROCEEDING

The Commission initiated this proceeding to find ways to encourage the deployment of advanced services. It is unfortunate that the Commission has become sidetracked from that objective by proposing to revisit the collocation and loop unbundling rules that it adopted only two years ago. Since the adoption of those rules, states have been diligently fulfilling their responsibility to provide competitors access to local network elements. The Commission should not now preempt the states in the name of promoting the deployment of advanced services. On the contrary, the states, with their greater knowledge of local conditions and their ability to arbitrate on a case-by-case basis, should continue to be at the forefront of implementing the collocation and unbundling rules to promote the development of advanced services. The Commission should maintain the focus of this proceeding on developing a framework that would allow ILECs to deploy advanced services on an integrated basis, and leave to the states the responsibility of implementing the collocation and unbundling requirements in particular cases.

A. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL COLLOCATION AND LOOP UNBUNDLING RULES THAT INCREASE REGULATORY BURDENS ON ILECS AND PREEMPT THE STATE COMMISSIONS

Section 251(c) requires ILECs to provide physical collocation or virtual collocation on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.⁹⁹

Section 251(c) also requires ILECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”¹⁰⁰ Congress specified that “[w]ithin 6 months after the date of enactment of the [1996 Act], the Commission *shall complete all actions necessary to establish regulations to implement the requirements of this section.*”¹⁰¹

In the *Local Competition Order*, the Commission adopted collocation and unbundling rules that purported to implement the requirements of Section 251(c). In adopting those rules, the Commission properly chose to rely “heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets.”¹⁰² With respect to collocation, the Commission established “minimum requirements for nondiscriminatory collocation arrangements” and granted the states the “flexibility to apply additional collocation requirements.”¹⁰³ Similarly, the Commission established a “minimum list of unbundled network elements” that ILECs must make available, and specifically requested “the states to evaluate, on a case-by-case basis, whether to require access to sub-loop elements, which

⁹⁹ 47 U.S.C. § 251(c)(4).

¹⁰⁰ *Id.* § 251(c)(3).

¹⁰¹ *Id.* § 251(d)(1) (emphasis added).

¹⁰² *Local Competition Order*, 11 FCC Rcd at 15512, ¶ 21.

¹⁰³ *Id.* at 15784, ¶ 558.

can be facilities or capabilities within the local loop.”¹⁰⁴ In accordance with the Commission’s decision, state commissions have been diligently implementing the Commission’s collocation and unbundling rules. The Commission should not now preempt the work of the state commissions by adopting additional and unnecessary national standards for collocation and loop unbundling.

B. RESPONSES TO SPECIFIC COLLOCATION AND LOOP UNBUNDLING PROPOSALS

1. Allocation And Exhaustion Of Space

BellSouth opposes proposals in the *Notice* that would effectively micromanage the collocation arrangements that ILECs enter into with their competitors. Of particular concern are the Commission’s proposals to adopt additional regulations governing the allocation and exhaustion of collocation space at the central office. Availability of collocation space depends on unique local conditions, such as building code requirements, that cannot be effectively regulated at the national level. Accordingly, the Commission should not require ILECs to offer a particular collocation arrangement and should not presume that a certain arrangement is technically feasible at one location simply because it is available at another location.¹⁰⁵ Similarly, the Commission should not adopt presumptive intervals for implementation of collocation arrangements or provision of unbundled network elements. Such a presumption steps over state-established guidelines regarding provisioning timeframes for these elements. Further, to require such intervals would not adequately account for roadblocks, often unforeseen, that may arise in the implementation of collocation or unbundling arrangements. State commissions have

¹⁰⁴ *Id.* at 15624, ¶ 241; 15632, ¶ 259.

¹⁰⁵ *Notice* at ¶¶ 137-39.

ample authority to investigate and determine whether an ILEC is delaying collocation or unbundling for improper reasons, and they are in a better position to evaluate on a case-by-case basis whether a delay is justified. The Commission should not use this proceeding to create unnecessary presumptions against ILEC provision of collocation space or unbundled elements.

BellSouth also opposes the Commission's proposals to increase the informational burdens on ILECs. The Commission proposes that ILECs that deny collocation because of space limitations must allow as a matter of right the requesting carrier to tour the premises and that ILECs must collect data and prepare reports on available collocation space, which must include the "measures that the incumbent LEC is taking to make collocation space available."¹⁰⁶ These proposed requirements would only increase the paperwork and personnel burden on ILECs without providing any measurable benefit for facilitating collocation.

The Commission also suggests that allowing a requesting carrier to tour the central office would benefit state commissions. However, the Commission should allow the state commissions to determine what is necessary to help them resolve any collocation disputes. Finally, the proposed reporting requirement would force ILECs to periodically gather information and prepare a report on their collocation space at each of their central offices, regardless of whether any carriers have requested collocation space at those offices. Instead of prescribing inflexible national rules, the Commission should allow the parties to discuss and resolve any issues they may have on a case-by-case basis.

¹⁰⁶ *Id.* at ¶ 147.